Key concepts of EU Anti-Discrimination Law

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Introduction

- Key concepts were first developed through case law
- Definitions are now incorporated into the Directives adopted subsequently
- Similar definitions can be found in the Directives 2000/78, 2000/43 and 2006/54
- The wording of the definitions may slightly vary but the concepts are similar even if differences may arise depending on the prohibited ground

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1. Direct Discrimination - Definition

- Directive 2000/43

Article 2 – Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated **less favourably** than another **is, has been or would be** treated **in a comparable situation** on grounds of racial or ethnic origin;

1. Direct Discrimination - Definition

3 key elements:

- The prohibited ground or the protected criteria
  - Directive 2006/54/EC; 2004/113/EC: gender
  - Directive 2000/78: religion or belief, disability, age, sexual orientation
  - Directive 2000/43: race or ethnic origin
- A less favourable treatment
- The comparison
- Example :
  - C-506/06, Mayr, 26 February 2008
  - C-54/07, 10 July 2008 Firma Feryn

Exception – the genuine occupational requirement

- “Member States may provide that a difference in treatment based on a characteristic related to [the protected ground] shall not constitute discrimination where, by reason of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate” (Directive 2000/78, Art. 4)
- Strict interpretation of this exception

Some specific exclusions

Article 4(2) of Directive 2000/78:

« Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos”.

Some specific exclusions

Article 6 - Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Some specific provisions

- And also:
  - Article 3(4), Directive 2000/78 (disability, age and the armed forces)
  - Article 2(5) Directive 2000/78 : Measures necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms

Positive Actions

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment" (Article 7 of Directive 2000/78)

Positive Actions

- Case Law on sex equality :
  - C-450/93, 17 October 1995, Kalanke;
  - C-409/95, 11 November 1997; Marschall;
  - C-158/97, 28 March 2000, Badek;
  - C-407/98, 6 July 2000, Abrahamsson:
  - C-476/99, 19 March 2002, Lommers;
  - C-463/19, 18 November 2020, Syndicat CFTC

A specific provision on disability

- Article 5 -Reasonable accommodation for disabled persons

“In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned”.

2. Indirect Discrimination

- ‘Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”

Indirect Discrimination

1. Indirect and effects-based nature of the alleged discrimination:
   - Existence of an apparently neutral measure, not directly linked to a forbidden discriminatory groun
   - This neutral measure causes a particular disadvantage for a protected group

2. Absence of objective justification
   - Reliance on a legitimate aim which is independent of the prohibited ground
   - Proportionality of the measure
     - The measure is appropriate (suitable) to achieve its legitimate aim
     - The measure is necessary

Examples

- Cases C-335/11 and 337/11, 1 July 2011 Ring and Skouboe (disability)
- Case C-157/15, 14 March 2017, Achbita (religion or belief)

3. The prohibition of discrimination by association

- The Coleman Case –C-303/06, 17 July 2008

4. Harassment

- Article 2.3. of Directive 2000/78: “Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States”.

harassment

i) unwanted conduct

ii) Related to a protected ground

iii) With the purpose or effect of violating dignity an of creating an offensive environment

5. Multiple or Intersectional Discrimination

- Discrimination and inequality often arise from a combination of characteristics, such as gender and ethnicity or age and disability
- Various terminology: multiple, cumulative, compound, combined, intersectional discrimination
- Until now, the ECJ ruled that if a measure is not capable of creating discrimination on any of the grounds prohibited by Directive 2000/78 – when these grounds are taken alone – than it cannot be considered to constitute discrimination as a result of the combined effect of such grounds (ECJ, Parris, 24 Nov. 2016, C-443/15)

Intersectional discrimination

- Reference to multiple discrimination can be found in recitals to the Directives 2000/43 and 2000/78 stating merely that « women are often the victims of multiple discrimination ».
- Directive 2023/970 of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms(the pay transparency Directive)
  - See Recital 25, 32 and Article 3(2) e): “For the purposes of this Directive, discrimination includes (…) intersectional discrimination which is discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or 2000/78/EC.